No. 04-1527

FILED
JAN 5 - 2005
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# In The Supreme Court of the United States

S.D. WARREN COMPANY,

*Petitioner,*

v.

MAINE BOARD OF ENVIRONMENTAL PROTECTION, *et al.*,

*Respondents.*

**On Writ Of Certiorari To The Maine Supreme Judicial Court**

## BRIEF FOR RESPONDENTS AMERICAN RIVERS AND FRIENDS OF THE PRESUMPSCOT RIVER

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## QUESTION PRESENTED

Whether hydroelectric facilities, which impound and divert water from a navigable water body and then channel and release that water through their facilities into the same water body downstream, result in "any discharge into the navigable waters," within the meaning of Section 401 of the Clean Water Act, 33 U.S.C. § 1341.

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## Brief for the Respondents American Rivers and Friends of the Presumpscot River

This case is steeped in American history. The water body at issue in the case, the Presumpscot River, is reflected in the writings of the great American poet Henry Wadsworth Longfellow, whose family had deep roots in Maine, especially in Gorham, near the river's banks.[1] The

[1] Robert Stafford Ward, *Longfellow's Roots in Yankee Soil*, 41 The New England Q. 180, 181 (1968). Part of Longfellow's poem "*An April Day*," which he wrote when he was 17, has long been considered evocative of the Presumpscot River: "*Inverted in the tide Stand the gray rocks, and trembling shadows throw. And the fair trees look over, side by side, And see themselves below.*" *See Inverted in the Tide*, Postcard (1900-1910) (held by Brown Univ., Providence, R.I.) (displaying a reproduction of a photograph of the Presumpscot River and a four-line passage from "An April Day" by Longfellow).

petitioner, S.D. Warren Co., was founded by Samuel D. Warren a few years after he and his brother Otis purchased their first mill in 1847. His son, Samuel D. Warren, Jr., became a close friend, law school classmate, and law partner of Louis Brandeis, with whom he co-authored one of the nation's most celebrated law review articles.[2] The modern-day controversy underlying this case is no less expressive of the country's history. The case is simply the most recent in a long line of controversies before this Court arising out of conflicts between public rights and private interests in navigable waters. *See, e.g., Gibbons v. Ogden*, 22 U.S. 1 (1824); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845); *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892); *Missouri v. Illinois*, 200 U.S. 496 (1906).

The precise legal issue presented is whether Congress authorized the States to require compliance with State water quality standards under Section 401 of the Clean Water Act, 33 U.S.C. § 1341. For more than 100 years, petitioner has operated its hydroelectric facilities on the Presumpscot River with little regard for the adverse impact on water quality. Dammed from stem to stern, the river has witnessed a profound decline in water quality and the consequent extirpation of its once prodigious sea-run fishery.

Petitioner claims the right to continue to operate its facilities for the next forty years in violation of State water quality standards. Because respondents American Rivers and Friends of the Presumpscot River agree with Maine that the plain meaning of Section 401 of the Clean Water Act authorizes the State to require petitioner's compliance with Maine water quality standards, we join Maine in urging the Court to affirm the lower court's judgment.

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[2] Samuel D. Warren, Jr. and Louis Brandeis formed the Boston law firm of Warren & Brandeis and co-authored *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). *See generally* Charles White Huntington, *The Warren-Clarke Genealogy: A Record of Persons Related within the Sixth Degree to the Children of Samuel Dennis Warren and Susan Cornelia Jackson* 169 (1894); Lewis J. Paper, *Brandeis* 21 (1983); The Westbrook History 2000 Committee & Dianne LeConte, *Westbrook on the Presumpscot* i (Arcadia 2000).

## Statement

This case concerns the meaning of Section 401 of the Clean Water Act, 33 U.S.C. § 1341. Petitioner owns and operates five hydroelectric facilities along the Presumpscot River in the State of Maine pursuant to federal licenses issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, 16 U.S.C. § 797(e). This Court granted review limited to the threshold jurisdictional question whether Section 401 applies to petitioner's facilities.

### I. The Clean Water Act and Section 401

"Congress passed the Clean Water Act for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.' 33 U.S.C. § 1251(a)." *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 166-67 (2001) (*SWANCC*); *Public Utility Dist. No. 1 v. Washington Dep't of Ecology (PUD No. 1)*, 511 U.S. 700, 714 (1994). "The 'major purpose' of the [Act] was 'to establish a *comprehensive* long-range policy for the elimination of water pollution.'" *Milwaukee v. Illinois*, 451 U.S. 304, 318 (1981) (emphasis in original) (quoting S. Rep. No. 92-414, 92d Cong.,1st Sess. 95 (1971)).

Prior to 1972, federal water pollution control legislation generally addressed water pollution by promoting the adoption and implementation by the States of enforceable water quality standards. *See EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 202-05 (1976). Because, however, a program "based on water quality standards * * * proved ineffective" (*id.* at 202) standing alone, Congress in 1972 comprehensively amended the federal law to blend two different approaches: a permit program designed to reduce discharges of pollutants based on a series of technology-based effluent reduction limitations promulgated by the U.S. Environmental Protection Agency and a significantly enhanced program

of State water quality standards adopted and administered by the States. *See id.* at 204-08; *Milwaukee v. Illinois*, 451 U.S. at 310-11; *compare, e.g., EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 69 (1980) (technology-based effluent limitations) *with Arkansas v. Oklahoma*, 503 U.S. 91, 101-102 (1992) (water quality standards).

1. Technology-Based Effluent Limitations. Sections 301 and 304(b) of the Clean Water Act, 33 U.S.C. §§ 1311, 1314(b), govern EPA's promulgation of a series of nationally uniform technology-based effluent limitations applicable to categories of point source dischargers of pollutants into the nation's navigable waters. These effluent limitations "translate[] Congress' broad goal of eliminating 'the discharge of pollutants into the navigable waters,' 33 U. S. C. § 1251 (a)(1), into specific requirements that must be met by individual point sources." *Nat'l Crushed Stone Ass'n*, 449 U.S. at 69. Sections 301(a) and 402, 33 U.S.C. §§ 1313(a), 1342, ensure implementation of the effluent limitations. Section 301(a) provides that "it is illegal for anyone to discharge pollutants into the Nation's waters except pursuant to a permit" (*Milwaukee v. Illinois*, 451 U.S. at 310-11) and Section 402 establishes the National Pollutant Discharge Elimination System (NPDES) permit program that "impose[s] limitations on the discharge of pollutants" at least as stringent as those mandated by the technology-based effluent limitations. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 174 (2000).

2. Water Quality Standards. Sections 303 and 304(a) of the Clean Water Act, 33 U.S.C. §§ 1313, 1314(a), establish the framework for State adoption and implementation of State water quality standards. "[T]he achievement of state water quality standards [i]s one of the Act's central objectives." *Arkansas v. Oklahoma*, 503 U.S. at 106. "Section 303 * * * requires each State, subject to federal approval, to institute comprehensive water quality standards establishing water quality goals for all intrastate waters." *PUD No. 1*, 511 U.S. at 704. Section 303(c)(2)(A) further provides that the standards established by each State shall "protect the public health or welfare, enhance the quality

of water, and serve the purposes of this Act" and "shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes and agricultural, industrial, and other purposes * * *." 33 U.S.C. § 1313(c)(2)(A). "Under the [Act], a water quality standard must 'consist of the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses.'" *PUD No. 1*, 511 U.S. at 714 (emphasis in original) (quoting 33 U.S.C. § 1313(c)(2)(A)).

3. Cooperative Federalism. "To achieve these ambitious goals, the Clean Water Act establishes distinct roles for the Federal and State Governments" (*PUD No. 1*, 511 U.S. at 704), amounting to "a partnership between the States and the Federal Government, animated by a shared objective * * *." *Arkansas v. Oklahoma*, 503 U.S. at 101. EPA promulgates the technology-based effluent limitations applicable to point source dischargers of pollutants and administers the Section 402 NPDES permit program, while providing States with the option under the Act of administering the permit program themselves, subject to federal oversight. *See* 33 U.S.C. § 1342(b)-(d); *Arkansas v. Oklahoma*, 503 U.S. at 102 & n.7. And, while the States are primarily responsible under the Act for promulgating their own State water quality standards in the first instance, "EPA provides States with substantial guidance in the drafting of water quality standards," reviews initial State standards for consistency with the Clean Water Act, and requires "that state authorities periodically review water quality standards and secure the EPA's approval of any revisions in the standards." *Arkansas v. Oklahoma*, 503 U.S. at 101 (citing 33 U.S.C. § 1313(c)).

Congress made clear, however, that the Federal-State "partnership" is not equal in all respects, at least in terms of each State's ability to protect water quality within its borders. As recently described by this Court, "Congress chose to 'recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution, to plan the development and use

(including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter.'" *SWANCC*, 531 U.S. at 166-67 (quoting 33 U.S.C. § 1251(b)) (emphasis supplied). To that end, nothing in Sections 303 or 304(a) authorizes EPA to reject a water quality standard proffered by a State for being unduly stringent, but instead only for being not sufficiently stringent. *See* 33 U.S.C. §§ 1313, 1314(a). And, Section 510 of the Act expressly preserves State authority to impose a more stringent "standard or limitation respecting discharges of pollutants" or "any requirement respecting control or abatement of pollution," while broadly declaring that "nothing in the [Act] shall * * * be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* § 1370.

4. Section 401. Section 401 reflects both the Federal-State partnership within the Clean Water Act and the separate roles served by those provisions aimed at reducing discharges of pollutants through the imposition of effluent limitations and those more broadly aimed at curbing water pollution as necessary to meet State water quality standards. In particular, Section 401 authorizes the States to ensure that any federally licensed or permitted activities that "may result in any discharge into the navigable waters" shall comply with any State water quality requirements, as well as with any other applicable requirements of the Act, including any technology-based effluent limitations on pollutants.

This authority derives from Sections 401(a) and 401(d). 33 U.S.C. § 1341(a)&(d). Section 401(a) requires the applicant for a "Federal license or permit" to provide the federal "licensing or permitting agency a certification from the State * * * that any such discharge will comply with applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title." *Id.* § 1341(a). As described by this Court, Section 401(d) "provides that any certification shall set forth 'any effluent limitations and other limitations * *

* necessary to assure that *any applicant*' will comply with various provisions of the Act and appropriate state law requirements." *PUD No. 1*, 511 U.S. at 711 (emphasis in original) (quoting 33 U.S.C. § 1341(d)). The Court has further held that "state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the § 401 certification process." *Id.* at 713 (quoting 33 U.S.C. § 1341(d)).

## II. The Presumpscot River and S.D Warren's Hydroelectric Facilities

Stretching 25 miles from the outlet of Sebago Lake to Casco Bay just north of Portland, Maine, the Presumpscot River was once a fast moving water containing numerous falls throughout its length. Indeed, "Presumpscot" is a Native American name literally meaning "many shallow rivers," or, as described by one Native American leader "rough places river." *See* Charles S. Fobes, *The Story of the Presumpscot*, 5 *Collections and Proceedings of the Maine Historical Society* 363 (2d series 1894); Fannie Hardy Eckstrom, *Indian Place Names of the Penobscot Valley and the Maine Coast* 159 (Maine Studies No. 55, Univ. Maine 1974). The river historically contained a large and self-sustaining fishery, including populations of various anadromous fish species, including Atlantic salmon, American shad, river herring, rainbow smelt and striped bass. Pet. App. A89.

Starting sporadically in the mid-1600s and then accelerating during the mid-1700s, settlers moving inland and upriver from coastal villages erected a series of mills and mill dams throughout the rapidly-falling river. *See* William Willis, *The History of Portland*, 69-70 (1831); Fobes, *The Story of the Presumpscot*, *supra*, at 370-80; *Westbrook on the Presumpscot*, *supra*, at i. As the number of mill dams increased, the impact of these dams on the anadromous fish was significant. As early as 1776, towns filed petitions with the colonial legislature, complaining about the

adverse impacts of the dams on fishing.[3]

Samuel D. Warren purchased his first paper mill along the Presumpscot River in 1847, forming the petitioner S.D. Warren company soon thereafter. By 1880, he had expanded mill operations along the river to create the largest paper mill in the world. *See Westbrook on the Presumpscot, supra,* at i; Charles E. Clark, *Maine - A Bicentennial History* 136-37 (1977). The ensuing expansion and stabilization of dams on the Presumpscot River fundamentally transformed the water body. What had once been a fast-flowing, continuous, biologically productive body of water became a river formally divided into distinct, isolated zones behind eight dams, seven of which petitioner owns and operates. As described by the Maine Department of Environmental Protection, "all anadromous fish were extirpated from the river by the construction of dams that blocked passage and by pollution." Pet. App. A89.

This case concerns five of petitioner's dams: the Saccarappa, Mallison Falls, Little Falls, Gambo, and Dundee hydroelectric facilities. *See* J.A. 9 (Map of Presumpscot River Projects). Each of petitioner's hydroelectric facilities, like hydroelectric facilities in general, use the gravitational force of water as it moves down a stream from an upper elevation to a lower elevation to drive a mechanical turbine that spins a

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[3] *See, e.g.*, Commissioners of Fisheries of the State of Maine, *First Report - 1867*, 35-37, 72-74 (1869); *The Petition of the Towns of Cape Elizabeth, Windham, Gorham, and Pearsontown in the County of Cumberland Humbly Shew* (Aug. 22, 1776) ("Mill Dams have been erected on the said River the passage of all kinds of Fish * * * has been totally obstructed & stopt in their course up said River to the great prejudice of many back Town."), *reproduced at* Maine Sup. Jud. Ct. Rec. App. vol. I, at 255-56 ; *The Petition of Joseph Wefton, and others, in Behalf of the Inhabitants of Cape-Elizabeth, Scarborough, Gorham, and Raymond-Town*, praying that an Act may pass to prevent the Obftruction of Fish in their Paſſage thro' Pefumpfcot-River and Alewive-Brook, *Votes of the Honorable House of Representatives, Tuesday, June 4, 1771, reprinted in* Journals of the House of Representatives of Massachusetts, 17, 19-20 (Mass. Historical Soc'y 1979).

generator, and thereby produces electricity.[4] Hydropower projects are classified by the nature of their operations, including pondage, storage, reregulating, pumped back storage, and run-of-the-river. Petitioner's five facilities are operated in a run-of-the-river mode, in which total water releases downstream are matched as closely as possible to total inflow to the project upriver on an "instantaneous basis." Pet. App. A19. Each facility first impounds the water upstream. The facility then diverts most of the water through a "power canal" and then turbines to generate electricity. After the turbines, the water is diverted into a "tailrace channel" from which the water is conveyed back into the river. *Id.* at A74-A78.[5]

Immediately downstream from each facility's impoundment is a section of the river referred to as a "bypass reach" because this is the portion of the river that is literally "bypassed" when the impounded water is diverted instead through the power canal, turbines, and tailrace channel. Petitioner's bypass reaches range from 300 feet to one-fifth of a mile in length and have historically contained very little (and sometimes no) water, depending on how much otherwise impounded water petitioner releases into the bypass through "spillways" or "sluice gates." Petitioner's impoundments range from 8 to 197 acres, and its dams are as tall as 50 feet. Pet. App. A74-A77. The joint appendix (pp. 9-17) includes narrative descriptions and illustrations of each of the five facilities.

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[4] *See generally Hydropower Engineering Handbook* (John S. Gulliver ed., 1991); Am. Soc'y Mech. Eng'rs, *The Guide to Hydropower Mechanical Design* (1996); C.C. Warnick, *Hydropower Engineering* (1984).

[5] As a practical matter, even such projects like petitioner's that are run on an "instantaneous basis" require some manipulation of water levels. Petitioner's projects allow for "maximum 1-foot impoundment fluctuations." Pet. App. A36. *See* U.S. Army Corps of Eng'rs, *Engineer Manual: Hydropower Engineering and Design* (Dec. 31, 1985) (EM 1110-2-1701); U.S. Dep't of the Interior, Bureau of Reclamation Power Research Office, *Hydropower* 6 (July 2005), *available at* http://www.usbr.gov/power/edu/pamphlet.pdf.

## III. Proceedings Below

1. FERC originally licensed petitioner's five hydroelectric facilities pursuant to the Federal Power Act, 16 U.S.C. § 797(e), in separate actions between 1979 and 1981.[6] Because each of these licenses expired on January 26, 2001, petitioner applied to FERC for new 40 year licenses. As part of that process, FERC regulations required that petitioner's applications include either a copy of a water quality certification issued by the State of Maine pursuant to Section 401 of the Clean Water Act, a request for such a certification, or evidence of a waiver by the State of Maine of such a certification. *See* 18 C.F.R. § 4.34(b)(5)(i). Because Maine did not waive its certification authority, petitioner filed a request for certification with the State. In making that request, however, petitioner claimed that Section 401 does not apply to any of its five hydroelectric facilities on the ground that none resulted in a "discharge into navigable waters," within the meaning of that statutory provision.

2. Respondent Maine Department of Environmental Protection (DEP) rejected petitioner's contention that Section 401 does not apply to its hydropower facilities, concluding that the "proposed continuing operation of the Presumpscot River Projects qualifies as an 'activity' * * * which may result in (a) discharge into the navigable waters of the United States." Pet. App. A82. The DEP ultimately granted Section 401 certification to each of petitioner's five facilities subject to a series of express conditions that the DEP concluded were necessary to ensure compliance with State water quality standards that the State had upgraded in 1985 pursuant to the Clean Water Act. Pet. App. A121-A140; *see* 33 U.S.C. § 1313(c).

The DEP based its conditions on the State water quality

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[6] Although petitioner was operating hydroelectric projects and therefore subject to federal regulation long before 1979, the federal government did not formally declare the Presumpscot River a "navigable water" until 1966. *See Cent. Me. Power Co.*, 36 F.P.C. 976, 977 (1966).

standards applicable to each of the segments of the Presumpscot River where petitioner's five facilities were located. For each segment, the DEP identified the applicable water quality classifications, designated uses, and numeric and narrative water quality criteria. Pet. App. A83-A87. The DEP concluded that petitioner's proposed operation of its facilities would cause violations of those State water quality standards, including dissolved oxygen standards applicable to certain segments of the river, and violations of the designated uses of fishing and habitat for fish and other aquatic life applicable to all segments, including the bypass reaches. *Id.* at A88-A89, A106-A107, A111-A112, A116.[7]

The DEP explained how impoundment of waters behind dams affects dissolved oxygen by reducing natural aeration, increasing time of water travel, increasing water temperature, and creating settling basins for sediments and nutrients. Pet. App. A114. The DEP further described how reductions in the amount of water because of reduced flow in segments, especially bypass reaches, adversely affects the quality of water in those segments. *Id.* at A94, A101-110. The amount of water affects water temperature and other physical, chemical, and biological criteria relevant to the water body's ability to serve as an aquatic habitat. *Id.* Accordingly, the DEP conditioned its Section 401 certification on, *inter alia*, increased releases to meet dissolved oxygen standards, increased releases to meet designated uses of habitat for fish and other aquatic

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[7] Maine water quality standards include classifications for individual water bodies and standards for each classification, with corresponding designated uses, numeric criteria, and narrative biological water quality criteria. *See* 38 M.R.S.A. §§ 467-470, 465-465-C. The Maine Legislature determines each water body's classification. There are four classes of water that are not "great ponds," Classes AA, A, B, and C, and Class GPA for waters classified as great ponds. *Id.* § 465; *see* Pet. App. A84-87. The Presumpcot River has different classifications for different segments. The waters at issue in this case are designated Class A, B, and C, and Dundee Pond is designated Class GPA. Pet. App. A83-A84. Notwithstanding these different classifications, all of these waters must be suitable for designated uses of fishing and habitat for fish and other aquatic life. 38 M.R.S.A. § 465.

habitat, restrictions on water levels and flow to avoid maintenance drawdowns in facility impoundments, and the installation of upstream and downstream passage facilities for specific species of fish. *Id.* at A121-A140.

3. Petitioner appealed the DEP's decision to the Maine Board of Environmental Protection (BEP), which affirmed the DEP in all respects. Pet. App. A35-A73. The BEP agreed with the DEP that each of petitioner's hydroelectric facilities would result in "discharges," within the meaning of Section 401, specifically rejecting petitioner's contention that Section 401 required such discharges to include pollutants. *Id.* at A40-A42. The BEP further found that petitioner had "not presented any persuasive arguments or supplemental evidence calling into question the Department's determinations that the conditions in the Section 401 certification regarding bypass minimum flows, * * * fish passage, reaeration, and recreational facilities are necessary to ensure that the operation of the Presumpscot River Projects will comply with State water quality standards." *Id.* at A47.

4. The state trial court affirmed. Pet. App. A19-A34. The court concluded that "the rerouting of the natural flow of the river" constitutes a "discharge" sufficient to trigger Section 401, "despite the possible nonexistence of pollutants in the 'discharge.'" *Id.* at A22-A24. The court likewise rejected petitioner's claim that Section 401 was not triggered where, as here, an existing facility was being issued a new license and there were allegedly no new discharges from their "continued operation." *Id.* at A5. Finally, the court found that none of the Section 401 conditions was "clearly erroneous." *Id.* at A25-A34.

5. The Maine Supreme Judicial Court affirmed. Pet. App. A1-A18. The court rejected petitioner's claim that Section 401 State certification authority "has not vested because the operation of its dams does not result in a discharge." *Id.* at A6. The court reasoned that "the water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section [401]." *Id.* at A10. According to the

court, a Section 401 "discharge" is not limited to a "discharge of pollutant" and in this case "a discharge results because Warren's dams remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river." *Id.* at A8 (emphasis in original).[8]

**Introduction and Summary of Argument**

For more than 150 years, petitioner has operated a series of hydropower facilities that have fundamentally transformed the physical, chemical, and biological integrity of Maine's historic Presumpscot River. White water has become flat water and the river's natural ability to serve as a host for a large and self-sustaining fishery, including populations of various anadromous fish, has been destroyed by petitioner's impoundment, diversion, and releases of water back into the Presumpscot.

This case will control the Presumpscot's future. For the past three decades, pursuant to the express language and direction of the Clean Water Act, the federal and state governments have worked cooperatively. They have sought to balance the Clean Water Act's directive to protect the water quality of our country's navigable waters and to restore their ability to serve as a habitat for fish and other aquatic life with the desire by those in private industry, such as petitioner, who seek to capture the potential energy contained within the natural flow of those waters. This cooperative federalism has not been without conflict but has, as a general matter, struck a successful balance between the competing public and private interests.

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[8] After the Maine BEP affirmed the DEP's certification and conditions, FERC granted petitioner's new license applications to operate its five hydroelectric facilities. *See S.D. Warren Co.*, 105 F.E.R.C. ¶¶ 61,009, 61,010, 61,011, 61,012, 61,013 (2003); *Multi-Project Order*, 105 F.E.R.C. ¶ 61,136 (2003). FERC upheld its orders on petition for rehearing by petitioner (*see S.D. Warren Co.*, 106 F.E.R.C. ¶ 61,087 (2004)), and the D.C. Circuit denied S.D. Warren's petition for review. *See S.D. Warren Co. v. FERC*, No. 04-1105 (D.C. Cir. May 6, 2005).

Pursuant to the federal statutory scheme, the State of Maine seeks now to "restore and maintain the chemical, physical, and biological integrity of the State's waters" (38 M.S.R.A. § 464(1)) by demanding for the first time in the history of petitioner's operations of its facilities that petitioner comply with water quality standards established by Maine and revised in 1985 under Section 303 of the Act. *See* 33 U.S.C. § 1313. Petitioner does not dispute that its operation of its five hydroelectric facilities violates those State standards. Petitioner claims the right to continue to operate its facilities for the next forty years unfettered by, and in violation of, the Presumpscot River's water quality standards, depriving Maine of its sovereign authority to ensure that those operations comply with those State standards. The Court should reject petitioner's claim and affirm the judgment of the Maine Supreme Judicial Court.

A. First, the plain meaning of Section 401 of the Clean Water Act belies petitioner's claim. Section 401 unambiguously authorizes States to ensure that federally licensed or permitted activities that "may result in any discharge into the navigable waters" comply with State water quality standards. Both the Maine environmental administrative agencies and the Maine courts correctly rejected petitioner's threshold jurisdictional claim that its facilities do not result in "any discharge" within the meaning of the Clean Water Act.

Petitioner's operation of each of its five hydroelectric facilities results in "discharges" because their releases of water into the Presumpscot River clearly amount to a flowing or issuing out, emission, or pouring forth, which is the ordinary meaning of the noun "discharge" in the context of water. The Act does not require an addition of pollutants for a discharge. Nor is there any merit to petitioner's contention that a discharge exists only if the waters being conveyed originated from a water body different from the one in which they are being released. Congress deliberately provided only that a discharge "includes" a discharge of a pollutant and, in sharp contrast

to virtually all of the other Act's definitions did not state that discharge "means" discharge of a pollutant. And, while Section 401 provides that the discharge must be "into" navigable waters, the word "into" does not mean that there must be an addition of something not previously in the same water body.

B. The plain meaning of "discharge" in Section 401 is confirmed by the purpose, structure, and legislative history of the Clean Water Act. The structure and purpose demonstrate that Congress intended that the Act's protection of water quality would not be limited to reduction of discharges of pollutants and that the States would retain the primary responsibility and right to safeguard water quality by ensuring compliance with State water quality standards within their borders. Congress, accordingly, provided States with broad authority to establish and enforce water quality standards, and the federal legislature defined "pollutant" and "pollution" in a manner reflective of the myriad ways beyond pollutant discharges that water quality can be adversely affected to guard against the very kind of unduly constrained construction petitioner now advances.

Petitioner's reliance on Clean Water Act Sections 304(f)(2) and 511(c)(2) is entirely misplaced. Neither provision remotely addresses the meaning of "any discharge" in Section 401. The former merely instructs the Administrator to gather certain information about pollution sources that are sometimes, but not exclusively, nonpoint in nature, and the latter does no more than limit the applicability of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, in circumstances wholly unrelated to this case.

The relevant legislative history, moreover, leaves no doubt that Congress understood and expressly sought in Section 401 to authorize States to require federally licensed hydroelectric facilities to comply with State water quality standards. Both when Congress in 1970 originally enacted the language now included in Section 401 and when Congress first passed Section 401 itself in the Clean Water

Act two years later, accompanying legislative reports and floor debates specifically discussed its applicability to hydroelectric facilities. Significantly, none of the textual limitations petitioner would now import into the meaning of "discharge" – "pollutant," "addition," and "discharge of a pollutant" – is found anywhere in the 1970 law from which Section 401 originates.

C. Finally, settled federal agency construction is likewise consistent with the plain meaning of "any discharge." The federal government, including FERC and EPA, has long maintained that the operation of hydroelectric facilities results in "discharges" sufficient to trigger Section 401. Those authoritative interpretations are reflected in numerous administrative rulings, agency reports, and briefs filed by the Solicitor General with this Court. All parties, including the States, regulated industry, and individual persons, have reasonably relied on that settled understanding for decades. If petitioner seeks to change the law, its only recourse for doing so should be before Congress and not this Court.

## Argument

Section 401 of the Clean Water Act authorizes States to ensure that federally licensed or permitted activities that "may result in any discharge into the navigable waters" comply with State water quality standards. In this case, petitioner does not dispute that its five hydroelectric facilities are each federally licensed or permitted within the meaning of Section 401. Nor is there any question that the five hydroelectric facilities are causing a violation of State water quality standards. The Maine Department of Environmental Protection (DEP) ruled that such a violation would result; the Maine Board of Environmental Protection (BEP) affirmed the validity of that factual finding; and the trial court upheld the finding, as did the Maine Supreme Judicial Court.

Petitioner also does not dispute that State water quality standards under Section 401 apply to the water quality

impacts of the federally licensed activity as a whole. Petitioner does not, accordingly, ask this Court to overturn its ruling in *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. at 711-12, that the certification goes to the entire activity's impact on State water quality standards and is not limited to just the discharge itself, which is simply the trigger. Nor does petitioner dispute the *PUD No. 1* Court's further holding that "a State may include minimum stream flow requirements in a certification issued pursuant to § 401 of the Clean Water Act insofar as necessary" to comply with a state water quality standard designated use that the water quality be sufficient for fish habitat. *Id.* at 723. Finally, petitioner does not dispute that each of its five hydroelectric facilities includes the kind of conveyances of water that, apart from the question whether discharges must always add pollutants, amount to a "point source" within the meaning of the Clean Water Act. Petitioner's claim (Br. 25) is "that section 401 is inapplicable" even if its facilities' conveyances of water are "from a point source."[9]

The only question before this Court, therefore, is whether any of the point source releases of water from each of petitioner's five facilities constitute a "discharge"

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[9] Petitioner's indirect concession that its dams include the kinds of conveyances treated as point sources when emitting pollutants is compelled by the Act's express terms. The Act expressly defines "point source" to include "a discernible, defined, discrete conveyance" and further lists "channel" as an illustrative example of such a source. 33 U.S.C. § 1362(14). As accurately described in petitioner's own brief, its facilities first "*channel*[ water] into a 'power canal,' past the turbines, and then back into the riverbed through a 'tailrace *channel*'" Pet. Br. 3 (emphasis supplied). It is only because the parties have stipulated that petitioner's conveyances do not include pollutants that this litigation does not raise the distinct question whether dams are point sources that discharge pollutants and therefore are subject to Section 402 of the Clean Water Act, 33 U.S.C. § 1342. *See Nat'l Wildlife Fed'n v. Gorsuch*, 693 F.2d 156 (D.C. Cir. 1982). Because, however, each of petitioner's hydroelectric facilities so clearly include at least one conveyance akin to a point source, such as the tailrace channel, this case also does not provide an occasion for this Court to consider the further question whether nonpoint sources can constitute a Section 401 "discharge." *See Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1095-99 (9th Cir. 1998).

within the meaning of Section 401. Petitioner maintains (Pet. Br. 14-20) that releases of water from a facility do not constitute discharges so long as the water being released downstream comes from the same water body from which the facility initially diverted the water upstream. The lower courts correctly rejected that claim, which is inconsistent with Section 401's plain meaning, the structure, purpose, and legislative history of the Clean Water Act, and longstanding administrative interpretation and implementation left undisturbed by Congress.

Indeed, the legal issue has been so well settled that otherwise opposing parties before this Court in *PUD No. 1* long ago agreed that the operation of hydroelectric facilities are subject to Section 401 because they "may result in discharges into navigable waters." 511 U.S. at 711 ("Petitioners concede that, at a minimum, the project will result in two possible discharges - the release of dredged and fill material during the construction of the project, and the discharge of water at the end of the tailrace * * * ."). Nothing in this Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004), disturbs the correctness of that view.[10]

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[10] In the lower courts, petitioner raised a second, distinct claim, only indirectly hinted at in its petition - that even if petitioner's facilities would in theory require Section 401 certification upon initial licensing, their "continued operation" does not because "relicensing of these existing Projects will not 'result in' any new discharge." Pet. 21. The Maine DEP, BEP, and lower courts each correctly rejected all of petitioner's jurisdictional arguments, with only the trial court singling out this distinct argument for separate discussion (*see* Pet. App. A25). In its merits brief before this Court, however, petitioner nowhere mentions this additional argument, apparently abandoning it altogether. And for good reason. In the context of an application for a new license upon an existing license's expiration, the relevant "activity" under Section 401 is the facility's future operation, which includes the possibility that it "may result in any discharge." Whether that activity is the same as has been licensed or permitted in the past is of no legal consequence under the statutory language. Similarly, under the Federal Power Act, FERC can consider the future consequences of an existing hydroelectric facility's operation and deny a new license altogether, grant the license or, as FERC did here, grant a license subject to new conditions beyond what it had imposed in the

## I. The Diversion and Release of Waters into the Presumpscot River by Petitioner's Hydroelectric Facilities Are "Discharges" into Navigable Waters within the Plain Meaning of Section 401

"The task of resolving the dispute over the meaning of [Section 401] begins where all such inquires must begin: with the language of the statute itself." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). "In this case, it is also where the inquiry should end" (*id.*) because the meaning of "discharge" in the context of the Clean Water Act is plain. The operation of each of petitioner's five hydroelectric facilities "results in [a] discharge into navigable waters," within the plain meaning of Section 401 of the Clean Water Act.

1. All five of petitioner's facilities are impounding and diverting waters from their natural flows, and then all five release diverted waters into navigable waters. The fact that the waters being released or otherwise flowing from petitioner's facilities originate from the same navigable water body upstream does not take them outside the plain meaning of discharge under Section 401. The plain meaning of discharge does not consider the source of the discharge, but only requires that the discharge be "into" navigable waters, and the Presumpscot River is indisputably such a water body.

That plain meaning is provided by the ordinary meaning of the word "discharge" in the statutory context of the Clean Water Act. Although the Act provides that the term "discharge" "*includes*" "discharge of a pollutant," the Act defines only what "discharge of a pollutant" "*means*" and never defines the meaning of "discharge" standing alone, which is how it stands in Section 401. Compare 33 U.S.C. § 1362(16) ("'discharge' * * * includes") with *id.* § 1362(12) ("'discharge of a pollutant' * * *

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past license. *See* 16 U.S.C. § 808(a)(1) ("[T]he Commission is authorized to issue a new license to the original licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations * * *").

means"). It is appropriate in this circumstance to look to authoritative dictionary definitions of "discharge" to discern its common, ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975).

The ordinary meaning of the noun "discharge" in the context of water is "a flowing or issuing out," "emission" or "pouring forth." *The American Heritage Dictionary of the English Language* 514 (4th ed. 2000) ("a flowing out or pouring forth; emission"); *Webster's Third New International Dictionary* 644 (3d ed. 1971) ("a flowing or issuing out"; "emission"); *Webster's Second New International Dictionary* 742 (2d ed. 1957) (same); *The Oxford English Dictionary*, 731-32 (2d ed. 1989) ("the act of * * * pouring forth; emission").[11] The *Oxford English Dictionary* refers to "the mouth of a river" as an example of a "place where something is discharged." *The Oxford English Dictionary* 732. It even provides an historical example from 1798 of the use of the term "discharges" in relation to the operation of dams. *Id.*[12]

2. Petitioner's operation of each of its five hydroelectric facilities results in "discharges," within the plain meaning of that term. Their releases of water clearly amount to "a flowing or issuing out," "emission" or "pouring forth." The tailrace channels, from which water diverted upstream and channeled through turbines is released back into the Presumpscot River downstream, are the most

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[11] *See PUD No. 1*, 511 U.S. at 725 (Thomas, J., dissenting) ("The term 'discharge' is not defined in the CWA, but its plain and ordinary meaning suggests 'a flowing or issuing out,' or 'something that is emitted.' *Webster's Ninth New Collegiate Dictionary* 360 (1991).").

[12] The plain, ordinary meaning of "discharge" in the context of water is further confirmed by other provisions of the Clean Water Act. Section 311 of the Act concerns liability for oil spills in navigable waters and Section 312 provides for federal standards of performance for marine sanitation devices. For the purposes of each of these sections, the Act specifically provides that "'discharge' includes, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying or dumping * * *." 33 U.S.C. §§ 1321(a)(2), 1322.

obvious examples of such discharges.[13]

Not surprisingly, government manuals and regulations describing the operation of dams, including hydropower facilities, invariably refer to their releases through spillways, gates, flashboards, channels, and turbines all as "discharges," consistent with the ordinary meaning of that term. *See, e.g.*, U.S. Army Corps of Eng'rs, *Engineer Manual: Hydropower Engineering and Design, supra*, at S-4; 18 C.F.R. § 12.31(c)&(d) (FERC regulation); 33 C.F.R. § 162.230(a) (Coast Guard regulation); 33 C.F.R. §§ 207.170(b), 207.310(d), 207.320(c), 208.26(k), 222.2, 222.6 (Army Corps of Eng'rs regulations).

## II. None of Petitioner's Arguments in Support of Its Claim that Its Hydroelectric Facilities Do Not Result In Discharges into Navigable Waters Has Merit

Petitioner's entire case rests on the erroneous threshold proposition that a discharge exists for purpose of Section 401 only if what is being emitted into navigable waters by the federally permitted or licensed activity constitutes an "addition." Petitioner further argues that an "addition" cannot be present where, as here, the facility is not itself adding pollutants and is emitting water downstream into the same navigable water body from which it initially diverted water upstream. Petitioner purports to buttress this argument by pointing out that Section 401 requires that the discharge be "into" navigable waters, which petitioner claims can occur only if the discharges originate outside the same navigable water body. *See* Pet. Br. 14-20.

Petitioner's argument is triply flawed. First, a "discharge" does not require an "addition" in the Clean Water Act. Petitioner is mistakenly equating the meaning of the distinct term "discharge of a pollutant," which does

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[13] The operation of the tailrace channels and the manner in which each conveys water into the Presumpscot River is well illustrated in the sketches of each of petitioner's five facilities prepared as part of FERC's Final Environmental Impact Statement, reproduced in the Joint Appendix at 11, 13, 14, 15, 17.

require such an "addition" of pollutants, with the meaning of "discharge," standing alone in Section 401, which does not. Second, as this Court itself has expressly recognized in the Clean Water Act context, a statutory requirement that a discharge be "into" navigable waters does not mean that the discharge must be conveying waters not previously in that same water body.

Finally, and perhaps most fundamentally, in presuming that the water being released by the hydroelectric facility downstream is the same water as that diverted upstream, petitioner completely misapprehends both the nature of water itself and the sweep of the Clean Water Act's concern with water quality. While the *amount* of water downstream may be the same as the amount diverted upstream, it is decidedly not the same water for the purposes of the statute. The facility has changed it, which is why the facility's operation causes a violation of State water quality standards.

### A. Section 401 Requires "Any Discharge" into Navigable Waters and Not an "Addition" to Navigable Waters

1. Petitioner's claim that Maine lacks Section 401 certification authority rests on the novel proffer that when Congress stated that "the term discharge 'includes' the discharge of a pollutant, Congress meant that a discharge *requires* the discharge of a pollutant." Pet. 20 (emphasis in original). The response, of course, is that "includes" does not mean "requires." Quite the opposite. The language and structure of the Clean Water Act leave no doubt that Congress deliberately declined to define the term "discharge" in a limited way in order to guard against the very kind of unduly constrained construction petitioner now advances.

Section 502 of the Clean Water Act sets forth 23 different terms of art and their definitions. *See* 33 U.S.C. § 1362. In every single instance but one, Congress wrote

those definitions in terms of what each "term * * * *means*."[14] Congress, accordingly, provided that "[t]he term 'discharge of a pollutant' and the term 'discharge of pollutants' each *means* * * * any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12) (emphasis added).

Congress, however, made one exception in Section 502's list of 23 terms, declining in that single isolated instance to define the term "discharge" exclusively with reference to what it "means." Congress separately provided that "[t]he term 'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis supplied). The import of the congressional decision to use the verb "includes" instead of "means" is well settled. "Where the definition of a term * * * was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include.'" *United States v. New York Tel. Co.*, 434 U.S. 159, 169 n.15 (1977). "The natural distinctions would be that where 'means' is employed, the term and its definition are to be interchangeable equivalents, and that the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition."

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[14] *See* 33 U.S.C. §§ 1362(1) ("The term 'State water pollution control agency' *means* * * *"); 1362(2) ("The term 'interstate agency' *means* * * *"); 1362(3) ("The term 'State' *means* * * *"); 1362(4) ("The term 'municipality' *means* * * *"); 1362(5) ("The term 'person' *means* * * *"); 1362(6) ("The term 'pollutant' *means* * * *"); 1362(7) ("The term 'navigable waters' *means* * * *"); 1362(8) ("The term 'territorial seas' *means* * * *"); 1362(9) ("The term 'contiguous zone' *means* * * *"); 1362(10) ("The term 'ocean' *means* * * *"); 1362(11) ("The term 'effluent limitations' *means* * * *"); 1362(12) ("The term 'discharge of a pollutant' and the term 'discharge of pollutants' each *means* * * *"); 1362(13) ("The term 'toxic pollutant' *means* * * *"); 1362(14) ("The term 'point source' *means* * * *"); 1362(15) ("The term 'biological monitoring' *shall mean* * * * *"); 1362(17) ("The term 'schedule of compliance *means* * * *"); 1362(18) ("The term 'industrial user' *means* * * *"); 1362(19) ("The term 'pollution' *means* * * *"); 1362(20) ("The term 'medical waste' *means* * * *"); 1362(21) ("The term 'coastal recreation waters' *means* * * *"); 1362(22) ("The term 'floatable material' *means* * * *"); 1362(23) ("The term 'pathogen indicator' *means* * * *") (emphasis supplied in all parentheticals).

*Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125-26 n.1 (1934).[15]

There is, accordingly, no merit to petitioner's central claim that by providing that "the term discharge 'includes' the discharge of a pollutant, Congress meant that a discharge *requires* the discharge of a pollutant." Pet. 20 (emphasis in original). Congress's selective use of the verb "includes" instead underscores that a statutory reference to "'discharge' when used without qualification," as is true for Section 401, "includes a discharge of a pollutant, and a discharge of pollutants," but is not limited to those kinds of discharges. 33 U.S.C. § 1362(16). "Discharge" refers to a "general class" and "discharge of a pollutant" or "pollutants" are simply "particular instances * * * specified in the definition." *Helvering*, 293 U.S. at 125-26 n.1.

2. For that same reason, likewise lacking merit is petitioner's related claim that a "discharge" exists only if there is an "addition" to navigable waters of the United States. Because only "discharge of a pollutant and * * * pollutants" are defined to mean "any addition of any pollutant to navigable water" (33 U.S.C. § 1362(12)), the Act cannot be fairly read as similarly requiring that a "discharge," standing alone, requires an "addition," let alone an "addition of any pollutant."[16] Neither an "addition" nor a "pollutant" requirement is therefore

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[15] *See United States v. American Trucking Assn*, 310 U.S. 534, 545 n.29 (1940) ("Congress gives recognition to the fact that the term is not on its face all-inclusive" by using the modifier "includes" rather than "means"); *Groman v. Commissioner*, 302 U.S. 82, 86 (1937) ("when an exclusive definition is intended the word 'means' is employed * * * whereas here the word used is 'includes'"); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) ("The word 'including' does lend itself to such destructive significance.").

[16] As demonstrated at pages 40-43, *infra*, the legislative history confirms the absence of any congressional intent to include an "addition" requirement. When Congress first enacted the statutory language now found in Section 401, "addition" was not even a relevant term of art under then existing federal water pollution control legislation.

necessary to trigger Section 401's State certification requirement.[17]

### B. Petitioner's Reliance on the Statutory Requirement that the Discharge Be "Into" Navigable Waters and on this Court's Decision in *Miccosukee* Is Misplaced

Petitioner further argues (Pet. Br. 17, 20-22) that Section 401's requirement that the discharge be "into" navigable waters and this Court's decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004) both support petitioner's claim that a Section 401 discharge requires an "addition" and that no such addition exists in this case. Neither that statutory language nor this Court's ruling, however, supports petitioner's conclusion.

1. Contrary to petitioner's characterization (Pet. Br. 17),

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[17] In this respect, while we defend the judgment of the Maine Supreme Judicial Court below, we do not embrace its reasoning in all respects. We agree with the State court that a discharge need not include pollutants to trigger Section 401 (Pet. App. A8), but for the reasons described above, we do not agree with the court that a discharge requires "an addition." Pet. App. A6. Nor do we agree with the court's characterization of waters that are subject to private control as "hav[ing] lost their status as waters of the United States." Pet. App. A8 (emphasis in original omitted). We did not urge either of these arguments upon the State courts in the proceedings below; nor did we defend that aspect of the lower court's reasoning in our opposition to the petition in this case. *See* American Rivers Br. in Opp. 8 ("interpretations of what constitutes an 'addition' *** not applicable to what constitutes 'any discharge' under Section 401"). None of those statements by the State court about "addition" is, moreover, necessary to defend its judgment because a Section 401 discharge does not require an "addition" according to its plain terms. If, however, this Court were to conclude otherwise, we do agree with the State court that the requisite "addition" would in any event be present in these cases, but not for the precise reasons offered by that court. The addition would not be because the waters somehow lost their status as "waters of the United States" once subject to private control, but because petitioner's facilities themselves transform the "physical, chemical, and biological integrity" of the waters by their impoundment, diversion, and channeling, and in that fundamental respect clearly "added" something to the waters not previously present within them. *See* pages 30-32, *infra*.

it does not "stretch[] credulity" to posit that discharges from a hydroelectric facility are going "into" the river when the water originates from the same water body upstream. The word "into" is a compound preposition of direction that is formed by adding the word "in" to the basic preposition of direction "to." The exclusive focus of the preposition of direction "into" is to signify movement in the direction of a goal. *See* Bryan A. Garner, *Garner's Modern English Usage* 436 (2003); *The Chicago Manual of Style* § 5.163 (15th ed. 2003). Where the object being moved was previously located is wholly irrelevant. There is nothing inconsistent with the notion that an object is being moved "to" or "into" a particular location where the object may have previously been before. A more precise way to describe such an action, while not grammatically necessary, is to state that the object is being moved "back to" or "back into" the previous location.

Where, as with Section 401, the relevant language simply says "discharge into," the preposition "into" admits of all possible circumstances, regardless of whether the discharge is into a new or previous location. There is nothing about the word "into" that suggests that a "discharge into navigable waters" must be an "addition" of something not previously in that same water body. When water is diverted from a navigable water body, the flow back from the diversion is "into" navigable water.

In *Miccosukee*, this Court made clear that "into" did not require an "addition" and, ironically, did so in the very sentence upon which petitioner otherwise heavily relies (*see* Pet. Br. 21): the Court's quotation of a Second Circuit statement that "'[i]f one takes a ladle of soup from a pot, lifts it above the pot, and pours it back *into* the pot, one has not 'added' soup or anything else to the pot." *See* 541 U.S. at 110 (emphasis added) (quoting *Catskill Mountains Chapter of Trout Unlimited, Inc. v. New York*, 273 F.3d 481, 492 (2d Cir. 2001)). Neither this Court nor the Second Circuit, therefore, considered it incredulous to describe an object going "into" a waterway even when it had previously been in that same waterway. Indeed, nor do

even petitioner or any of its supporting amici before this Court, notwithstanding their legal arguments to the contrary. Their legal briefs are replete with descriptions of their respective hydropower facilities emitting waters "into" rivers downstream.[18]

2. Petitioner's even broader reliance (Pet. Br. 20-22) on this Court's decision in *Miccosukee* is likewise unavailing. Contrary to petitioner's claim, *Miccosukee* does not support the "conclusion[] that a discharge into the river requires an addition of something to the river." *Id.* at 20. Neither Section 401 nor the meaning of the term "discharge," standing alone, was at issue in *Miccosukee*. As petitioner itself acknowledges, the exclusive question presented in *Miccosukee* was whether a specific pumping facility was subject "to *Section 402* of the Clean Water Act," which requires a permit "for any facility that causes 'the discharge of any pollutant.'" Pet. Br. 20 (emphasis supplied). What petitioner's argument conveniently elides is the fundamental distinction between Section 401 and Section 402 that is fatal to its claim: While the Section 402 permit requirement at issue in *Miccosukee* is triggered under Section 301(a) only by the "discharge of any pollutant" (33 U.S.C. § 1311(a)), State certification authority under Section 401 is triggered by "any discharge" without the additional requirement that the discharge be of "any pollutant."

For this reason, petitioner's reliance on *Miccosukee* collapses back into its argument that "discharge" *means* "discharge of a pollutant" because "includes" means

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[18] *See, e.g.*, Pet. Br. 3 ("water is channeled * * * back *into* the riverbed through the 'tailrace channel'") (emphasis supplied); Amicus Br. New England Legal Foundation in Support of Petitioner, 10 ("the physical removal from and the replacement of the same water *into* the same body of water, cannot qualify as an 'addition') (emphasis supplied); Amicus Br. Salt River Project & Agric. Impr. & Power Dist. in Support of Petitioner, 1-2 ("water stored behind SRP dams * * * flows through an outflow tunnel in the dam *into* the river downstream") (emphasis supplied); Amicus Br. City of Augusta, Ga, in Support of Petitioner, 1 ("a channel that routes water from the River * * * and back *into* the River again") (emphasis supplied).

"requires." As described above, the latter argument lacks merit and nothing in *Miccosukee* animates it. No doubt that is why petitioner failed even to cite to *Miccosukee* in its briefs before the Maine Supreme Judicial Court.

### C. Petitioner's Characterization of a Hydroelectric Facility as "Mere Flow of a River Through a Dam" Ignores the Undisputed Fact that Its Facilities Cause Violations of State Water Quality Standards

Petitioner bookends its entire presentation from the "Question Presented" to the "Conclusion" with the flawed notion, repeated throughout its brief, that a hydroelectric facility is a "mere flow of a river through a dam." Pet. Br. i, 13, 14, 18, 20, 21, 25, 26, 34; *see also id.* at 13 ("merely touch upon the navigable waters"). Petitioner, however, completely misapprehends the nature of hydroelectric facilities, the nature of water in the ecosystem, and the sweep of the Clean Water Act's concern with water quality in presuming that the water being released by the facility downstream is essentially the same water as that impounded and diverted upstream. Petitioner's facilities have a profoundly destructive impact on the quality of the waters of the Presumpscot River.

1. While the *amount* of water ultimately flowing downstream may eventually be the same as the amount of water originally impounded and diverted upstream, it is decidedly not the same water for the purposes of the Clean Water Act. The hydroelectric facility has changed it, which is why each facility's operation causes a violation of State water quality standards and therefore is "pollution" affecting the "chemical, physical, and biological * * * integrity of the water," within the meaning of the Act. *See* 33 U.S.C. § 1362(19). No pollutants need be physically added for the occurrence of the kind of degradation of water quality that constitutes water pollution within the Act's broad sweep. Indeed, a hydroelectric facility fundamentally alters the physical and ecological integrity of a river when white water becomes flat water. That is

precisely why Section 401, unlike Section 402, is not limited to pollutant reduction and is instead more broadly directed at the adverse impacts on water quality of discharges and their related activities.

Hydropower facilities, including so-called "run-of-the-river" facilities like petitioner's, transform the physical, chemical and biological nature of the water. Water does not merely flow passively through a hydroelectric facility. If it did, the facility would not be serving its intended function, which is to remove the energy of the water contained within its flow potential. Hydroelectric facilities such as petitioner's deliberately impound, divert, channel, and release water in order to convert the energy within that flow into electrical energy in a manner similar to the way that petitioner's mill dams more than a century ago sought to produce mechanical energy. They necessarily have adverse environmental impacts, which is why they are regulated pursuant to a variety of federal and state laws, including State water quality standards. *See* Amicus Br. Water and Riverine Scientists in Support of Respondents; Amicus Br. National Wildlife Federation *et al.* in Support of Respondents.[19]

2. Respondent Maine DEP found that petitioner's proposed operations of its five facilities would each violate Maine water quality standards because of the adverse impacts of the entire activity and not just the discharges alone. Pet. App. A88-A89, A106-A107, A111-A112, A116.

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[19] For instance, by diverting water, hydropower projects create bypassed river channels with too little water remaining to meet the needs of in-stream ecosystems. The remaining low volume of water can be more easily heated and limit the ability of a water body to tolerate pollutants. N.L. Poff et al., *The Natural Flow Regime*, 47 Bioscience 769-84 (1997). By increasing depth and decreasing flow, an impoundment separates water into several layers with varying temperature, a process known as temperature stratification, which inhibits transfer of oxygen between layers. The subsequent release of some water low in dissolved oxygen and other water higher in temperature has detrimental impacts on downstream water quality. *See* B.L. Yeager, *Impacts of Reservoirs on the Aquatic Environment of Regulated Rivers* (Tenn. Valley Auth., Water Res., Aquatic Biology Dep't 1994) (TVA/WR/AB-93/1).

The DEP concluded that petitioner's impoundment of waters behind dams would lower dissolved oxygen by reducing natural aeration, increasing time of water travel, increasing water temperature, and creating settling basins for sediments and nutrients. *Id.* at 114. The DEP also based its findings on how reduced water flow in segments of the Presumpscot River, especially bypass reaches, adversely affects water quality in those segments to the extent that the smaller volumes in those segments affects water temperature and other physical, chemical, and biological criteria relevant to the water body's ability to serve as an aquatic habitat. *Id.* at 101-10. Here, as in *PUD No. 1*, "water quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, be it for drinking water, recreation, navigation, or as here, as a fishery." 511 U.S. at 719.

The validity of DEP's findings, which were upheld by the Maine BEP and the state courts, are not in dispute before this Court. Nor is the reasonableness of the license conditions required by the DEP pursuant to its Section 401 State certification authority. Petitioner's repeated references to a hydroelectric facility as a "mere flow of water through a dam" cannot be squared therefore with the undisputedly destructive impacts that its five facilities have had on the Presumpscot River and would continue to have on the river absent the license conditions being imposed by the State pursuant to Section 401.

### D. In All Events, Petitioner's Discharge of Waters Downstream Would Amount to an "Addition"

Even if this Court were, contrary to our primary submission, to conclude that a Section 401 "discharge" does require an "addition" to navigable waters, such an addition would be present here. While we do not share the Maine Supreme Judicial Court's view that an "addition" is present because the waters of the Presumpscot River ceased being navigable waters once subject to private control (*see* note 17, *supra*), there is force

to the state court's basic finding that petitioner's facilities have in all events added something to the River.

As just described, the water discharged downstream by petitioner's facilities is different than the water originally impounded and diverted upstream because of those diversion and impoundment activities. The facilities have not therefore merely subtracted waters. Their discharges have added waters to the River downstream that are fundamentally different in their physical, chemical, and biological character than those impounded and diverted, and that cause water pollution.

We do not read this Court's statement in *Miccosukee* that a ladling of water in and out of a single water body does not constitute an "addition" as compelling a different conclusion. *See* 541 U.S. at 110. First, the Court was assuming that a passive ladling, as compared to an active hydropower facility, was not changing the nature of the water removed and released. The Court did not purport to address the quite different issue presented where, as here, the water being removed and then released is fundamentally different in character either because of the impact on water chemistry of those intervening activities or because the time or place of removal and release are sufficiently distanced so as to undermine the Court's essential assumptions of ecological equivalency. The Court was also not purporting to decide a legal issue at all but only describing an issue that it considered not disputed by the parties in that case. *See id.* at 109 ("The Tribe does not dispute that if C-11 and WCA-3 are simply two parts of the same water body, pumping water from one into the other cannot constitute an 'addition' of pollutants.").[20] In no event, therefore, can the Court's

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[20] It is far from clear, moreover, that the Court was correct in its assumption that the facts and related legal issue were not in dispute in *Miccosukee* itself. Respondent Miccosukee Tribe filed a petition for rehearing on that precise ground, arguing that it had expressly declined to make such a legal or factual concession. *See* Petition for Rehearing of Miccosukee Tribe, *South Florida Management Dist. v. Miccosukee Tribe*, No. 02-626 (filed April 16, 2004). Although the Court denied the petition, that denial does not amount to a ruling on the

statement about the meaning of "addition" be considered precedent with regard to different factual circumstances presented in future cases.

For instance, the Clean Water Act clearly provides that the deposit of "dredged and fill material," which typically originates from the same water body in which it is deposited, constitutes a "discharge of pollutants" within the meaning of the Act. *See* 33 U.S.C. § 1344. The Act's definition of "pollutant" as including "dredged spoil," 33 U.S.C. § 1362(6), similarly contemplates that the removal from, and redeposit of, a substance into the same water body can, under certain circumstances, constitute the "addition" of a pollutant. As with river water that is diverted and processed through a hydroelectric facility before being released downstream, the act of dredging material from the bed of a stream transforms that substance into something new - "dredged spoil" or "dredged material" - that can adversely affect the quality of the stream when "added" back into it. [21]

## III. The Plain Meaning of "Discharge" in Section 401 Is Confirmed By the Purpose, Structure, and Legislative History of the Clean Water Act

The conclusion that the plain meaning of a Section 401 "discharge" does not require a "discharge of a pollutant" is further supported by the Clean Water Act's structure, purpose, and legislative history. The structure and purpose demonstrate that Congress intended that the Act's protection of water quality would not be limited to reduction of discharges of pollutants and that the States would retain the primary responsibility and right to safeguard water quality within their borders. The legislative history confirms that Congress understood the critical role that Section 401 would play in ensuring that States retain authority to safeguard water quality,

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merits of the petition's substantive argument. *See* 541 U.S. 1057 (2004).

[21] *See generally* Amicus Br. Former EPA Asst. Administrators Charles Fox *et al.* in Support of Respondents.

including the provision's applicability to hydropower facilities.

### A. Congress Intended to Give States Primary Authority to Ensure Compliance with State Water Quality Standards

As described at the outset of this brief (at pp. 3-7, *supra*), "Congress passed the Clean Water Act for the stated purpose of 'restoring and maintaining the chemical, physical, and biological integrity of the Nation's waters.'" *SWANCC*, 531 U.S. 159, 166-67 (2001) (quoting 33 U.S.C. § 1251(a)). Congress established two different and complementary legislative pathways to accomplish that ambitious objective: (1) a series of federally-promulgated technology-based effluent reduction limitations aimed at discharges of pollutants administered through the Section 402 NPDES permit program; and (2) State water quality standards administered by the States under EPA's supervision to regulate water pollution more generally. *See* pages 3-5, *supra*. Consistent with this dual pathway, Congress intentionally did not restrict "discharge" to require "discharge of a pollutant." Nor did Congress limit the meaning of "pollution" to adverse effects on water quality caused by the introduction of "pollutants." And, in similarly crafting Section 401, Congress ensured that the Act's broader pollution prevention goals were not frustrated by a narrow focus on measures to reduce pollutants. Congress provided States with Section 401 authority to require compliance with State water quality standards by federally licensed activities whenever they might result in "any discharge" without the further need to establish a "discharge of a pollutant."

1. It is therefore no mere happenstance that Section 401 State certification authority is triggered by "any discharge," while Section 402 permitting requirements are triggered only by a "discharge of pollutants." *See* 33 U.S.C. §§ 1311(a), 1342(a). The former is concerned with water quality in general and the latter is central to the part of the Act aimed at reduction of pollutants in point source

discharges. Under Section 401, a State is authorized to certify whether a federally licensed activity resulting in a discharge complies with a host of the Act's provisions, including Section 303 under which States develop their State water quality standards. *See* 33 U.S.C. § 1341(a)(1) ("such discharge will comply with the applicable provisions of section[] * * * 303 * * * of this title"); *PUD No. 1*, 511 U.S. at 714 ("state water quality standards adopted pursuant to § 303 are among the 'other limitations' with which a State may ensure compliance through the Section 401 certification process" ). By contrast, even the formal statutory title of the Section 402 permit program – the "National *Pollutant* Discharge Elimination System" – emphasizes Section 402's exclusive focus on pollutant reduction. *See* 33 U.S.C. § 1342 (emphasis supplied). That same distinction between the purposes and scope of Section 401 and 402 is also plainly why Congress provided that "discharge" "includes" rather than "means" discharge of a pollutant so as to allow for the broader regulatory sweep necessary in the context of water quality standards.

2. The same careful statutory distinction is reflected in Congress's decision to define "pollutant" and "pollution" quite differently in the Clean Water Act. The Act provides that "[t]he term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage" along with a host of other kinds of "discarded material." 33 U.S.C. § 1362(6). The Act does not, however, then define "pollution" strictly in terms of pollutants. Instead, consistent with the Act's overall objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" (*id.* § 1251(a)), the Act broadly provides that "[t]he term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water." *Id.* § 1362(19). The overriding statutory objective, like the complementary definition of "pollution," "incorporated a broad, systemic view of the goal of maintaining and improving water quality: as the House Report on the legislation put it, 'the word "integrity" * * * refers to a

condition in which the natural structure and function of ecosystems [are] maintained.' H. R. Rep. No. 92-911, p. 76 (1972)." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132-33 (1985). The definition of "pollution" thereby recognizes that the addition of pollutants, whether by discharge or otherwise, is not the exclusive cause of water pollution within the Act's purview.

Petitioner, therefore, completely misapprehends the nature of both water pollution and the Clean Water Act when it argues (Pet. 19) that the reason "discharge" must require the addition of a pollutant is because "it is clear from the outset that pollution is the *raison d'etre* for the statute." Petitioner presumes that there cannot be water pollution of concern to the Act without an addition of pollutants. As underscored by the Act's separate definitions of "pollutant" and "pollution," however, it is well settled that one can have pollution even absent this addition of pollutants. Indeed, for just this precise reason, this Court has already expressly found that "there is recognition in the Clean Water Act itself that reduced stream flow, *i.e.* diminishment of water quantity, can constitute water pollution." *PUD No. 1*, 511 U.S. at 719.

3. Congress's decision to provide States with certification authority whenever a federally licensed activity may result in a discharge, without requiring a discharge of pollutants, is also consistent with the Act's policy to "recognize, preserve, and protect the *primary responsibilities and rights of States* to prevent, reduce, and eliminate pollution * * * ." 33 U.S.C. § 1251(b) (emphasis supplied). As described above (pp. 5-6, *supra*), the Clean Water Act creates a "a partnership between the States and the Federal Government, animated by a shared objective * * *" to restore and maintain the quality of the nation's waters. *Arkansas v. Oklahoma*, 503 U.S. at 101. Yet, with regard to the establishment and enforcement of State water quality standards, unlike the federally-promulgated technology-based effluent reduction limitations on discharges of pollutants, the States are akin to the senior partners. Albeit with some federal guidance and

supervision, the States develop the standards, including both the designated uses and water quality criteria, prepare the continuing planning process for their implementation, and "are responsible for enforcing water quality standards on intrastate waters." *PUD No. 1*, 511 U.S. at 707; *see id.* at 714-15; 33 U.S.C. §§ 1313, 1314(a). Section 401 promotes these same statutory objectives. As this Court explained, "[i]n addition to these primary enforcement responsibilities, § 401 of the Act requires States to provide a water quality certification before a federal license or permit can be issued for activities that may result in any discharge into intrastate navigable waters. 33 U.S.C. § 1341." *PUD No. 1*, 511 U.S. at 707.

4. Finally, neither Section 304(f)(2) nor 511(c)(2)(A) supports petitioner's claim that its hydroelectric facilities fall outside the scope of Section 401. *See* Pet. Br. 24, 26-28. Section 304(f)(2) in no manner intimates that hydropower facilities do not result in discharges subject to Section 401. And, Section 511(c)(2)(A) is far too slender a statutory reed to support the contention that Congress restricted the meaning of "discharge" to "discharges of pollutants."

a. Section 304(f)(2) is largely beside the point, which is likely why petitioner did not cite to it even once in any of its many pleadings before the Maine DEP or BEP, or the state courts. To be sure, Section 304(f)(2)(F) instructs the Administrator of EPA to provide to federal agencies, the States, and water pollution control agencies information, *inter alia*, about "methods to control pollution resulting from * * * changes in the movement, flow, or circulation of any navigable waters * * * , including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities." 33 U.S.C. § 1314(f)(2). But in no event does such a statutory requirement for the provision of information support petitioner's quite different claim that Congress intended to exempt hydropower facilities from Section 401 regulation. All Congress did in Section 304(f)(2) was expressly "recognize[] that water 'pollution' may result" from the operation of dams (*PUD No. 1*, 511 U.S. at 719-20) and, accordingly, instruct the Administrator

to gather and disseminate more information about ways to address the problem.

Congress did not suggest in Section 304(f)(2) or anywhere else in the statute that dams, or any of the other activities listed in that Section that cause water pollution, were exempt from otherwise applicable Clean Water Act requirements, whether arising under Section 402 or Section 401. Indeed, it has been settled law for decades that although Section 304(f)(2) generally concerns nonpoint sources, many of those same listed activities listed in that Section, including runoff from agricultural, silvicultural, mining, and construction, are sometimes point sources that discharge pollutants and are therefore subject to Section 402 for that reason. Federal courts of appeals and EPA have long expressed that view, which this Court also recently embraced.[22]

b. Section 511(c)(2) is no more favorable to petitioner. Petitioner relies heavily (Pet. Br. 26-28) on the fact that Section 511(c)(2) limits application of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, when a federal agency is licensing or permitting conduct of any activity which "may result in the discharge of a pollutant into the navigable waters" but does not similarly limit NEPA's application when the activity includes only a "discharge." 33 U.S.C. § 1371(c)(2). Petitioner offers this as proof that Congress equated "discharge" with

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[22] *See Miccosukee*, 541 U.S. at 106 (emphasis in original) ("§1314(f)(2)(F) does not explicitly exempt nonpoint pollution sources from the NPDES program if they *also* fall within the 'point source' definition"); *U.S. v. Earth Sciences, Inc.*, 599 F.2d 368, 372 (10th Cir. 1979); *Sierra Club v. Abston Constr. Co.*, 620 F.2d 41, 44 (5th Cir. 1980); Memorandum from Ann R. Klee, General Counsel & Benjamin H. Grumbles, Assistant Administrator for Water, *Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005) ("Mere mention of an activity in section 304(f) does not mean it is exclusively nonpoint source in nature."); EPA General Counsel Opinion, *Authority to Exclude Point Sources from the Permit Program* (Aug. 3, 1973) ("To be sure, sections 208(b)(2)(F) and 304(e) indicate that Congress thought that some agricultural runoff would not be a point source. However, these sections cannot be read to mean that pipes, ditches, etc., are not point sources when they occur on farms.").

"discharge of a pollutant." Section 511(c)(2), however, cannot possibly carry the substantive weight petitioner seeks to assign it.

Section 511(c)'s exclusive purpose is to define the applicability of the procedural requirements of NEPA to federal agency actions taken under the Clean Water Act. Section 511(c)(1) provides that certain activities shall not be deemed to trigger NEPA's environmental impact statement requirement (33 U.S.C. § 1371(c)(1)), and Section 511(c)(2) provides that nothing in NEPA shall be deemed to authorize review of certain actions taken under the Clean Water Act (33 U.S.C. § 1371(c)(2)). Neither Section 511(c)(1) nor 511(c)(2), upon which petitioner relies, evinces any intent to construe the scope or meaning of the Act, let alone upset its otherwise plain meaning.

In any event, petitioner is also wrong in suggesting that the language of Section 511(c)(2) is somehow inconsistent with the conclusion that the plain meaning of "discharge" does not require an addition of a pollutant. That Congress referred in Section 511(c)(2)(A) to "discharge of a pollutant" and not, as in Section 401, to a "discharge" merely confirms once again that Congress knew how to state "discharge of a pollutant" when it wanted to, as it did here and in Section 402. And, contrary to petitioner's assumption, there is good reason for why Congress drew that distinction in Section 511(c)(2).

Congress's purpose in Section 511(c) was to limit interference by NEPA's procedural requirements with the EPA's administration of the Section 402 or 404 permit requirements and the Agency's related promulgation of technology-based effluent limitations on discharges of pollutants under Sections 301 and 304(b). At the same time, however, Congress sought to allow for continued NEPA review when the safeguards presented by Sections 301, 304(b), 402, and 404 were not present. That is why Section 511(c)(2) limits NEPA review when there is a "discharge of a pollutant" but not when there is a "discharge" that does not include an addition of pollutants and therefore does not trigger Sections 301, 304(b), 402,

and 404. Indeed, during the committee and floor debate on the language, individual members of Congress discussed the need for NEPA review in just such a circumstance and even specifically referred to "such matters as dams licensed by the Federal Power Commission." 118 Cong. Rec. 10646 (1972) (statement by Rep. Abzug) (Feb. 24, 1972); *see also* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 414 (1972) (Letter from Rep. Henry S. Reuss et. al, to Hon. John A. Blatnik, Chairman, House Committee on Public Works).[23]

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[23] Section 511(c)'s language regarding the applicability of NEPA to the Water Act was the result of considerable legislative compromise, reflected in floor debates on when NEPA should and should not apply to actions taken under the Clean Water Act, including Section 401 certifications. *See* 118 Cong. Rec. 10646-47, 10672-73 (1972) (statements of Representatives Abzug, Dingell, Wright, and Wolff). The versions of the bill initially passed and reported by both the House and the Senate each included broad NEPA exemptions for review of "water quality considerations" whenever there was a Section 401 certification and/or a Section 402 permit. *See* 117 Cong. Rec. 38885 (1971), reproducing S. 2770 (passed Senate, Nov. 2, 1971); 118 Cong. Rec. 10804 (1972), reproducing H.R. 11896 (passed House March 29, 1972). The Senate version applied broadly to "any discharge" (*see* 117 Cong. Rec. at 38887, reproducing S. 2770, § 511(d)) and the House version applied even more broadly to "any activity" (*see* 118 Cong. Rec. at 10828). The language, however, was significantly amended in Conference Committee to eliminate the broader reference to "any discharge" in favor of a narrower reference to "discharge of any pollutant," reflecting the competing concerns of those seeking to avoid NEPA interference with pollutant discharge permitting by EPA under Section 402 and those seeking to ensure that federal agencies other than EPA licensing activities that caused water quality problems still had to comply with NEPA. *See* 118 Cong. Rec. 33700-01 (1972) (statement of Senator Muskie presenting Conference Report); *id.* at 37059 (statement of Representative Dingell); H.R Conf. Rep. No. 92-1465, 92d Cong., 2d Sess. 148 (1972). Congress also had cause for concern that NEPA might otherwise interfere with administration of the Sections 402 and 404 permit program. A major impetus for congressional consideration of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, was a federal district court ruling in *Kalur v. Resor*, 335 F. Supp. 1 (D.D.C. 1971), which enjoined the Army Corps of Engineers permit program under the Rivers and Harbors Act, 33 U.S.C. § 407, for failing to comply with NEPA. *See* William L. Andreen, *The Evolution of Water Pollution Control in the United States – State, Local and Federal Efforts, 1789-1972: Part II*, 22

**B. Section 401's Legislative History Confirms that "Any Discharge" Includes the Release of Water from Hydropower Facilities Without a Showing of an "Addition of Any Pollutants"**

The legislative history confirms Section 401's plain meaning, including both Congress's general intent not to require a showing of a "discharge of pollutants" and its specific intent to subject hydropower facilities to State water quality certification authority. This is not an instance where Congress allegedly "alter[ed] the fundamental details of a regulatory scheme in vague terms or ancillary provisions," akin to "hid[ing] elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001). Congress enacted the language of Section 401 specifically intending the precise result compelled by that language's plain meaning: to subject federally licensed hydropower facilities to State authority to ensure compliance with State water quality standards.

1. Section 401 originated as Section 21(b) of the Water Quality Improvement Act of 1970 ("1970 Act"), Pub. L. No. 91-224, 84 Stat. 91. The jurisdictional language from section 401(a) that is the focus of this case—"any activity * * * which may result in any discharge into the navigable waters"—is, as petitioner concedes (Pet. Br. 29), "the same language that had appeared in section 21(b) of the prior law." When Congress first enacted that language, Congress understood that it would apply to federally licensed hydropower facilities. A House Report responded to concerns that nuclear power projects would be subject to the certification requirement by noting "that a federal license or permit of some kind is required for almost *all electric generating plants*, and any federal agency granting the relevant license can and should condition the grant upon compliance with applicable water quality

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Stan. Envt'l L.J. 215, 260 (2003). By legislative compromise, the sole exception for NEPA review of Section 402 permits in the statute as finally enacted was for "the issuance of a permit under section 402 of this title for the discharge of any pollutant by a new source." 33 U.S.C. § 1371(c)(1).

standards." H.R. Rep. No. 91-127, 91st Cong. 1st Sess. 7 (1969) (emphasis supplied).[24]

Significantly, none of the textual limitations that petitioner would import into Section 401(a) – "pollutant," "addition," and "discharge of a pollutant" – is found anywhere in the 1970 Act. It was not until the 1972 Amendments, when Congress first mandated technology-based effluent limitations (sections 301 and 304) and corresponding permits for individual dischargers (sections 402 and 404), that the definitional terms on which petitioner relies were created. As previously described (*see* page 4, *supra*), the core of the technology-based program was set forth in Section 301, which prohibits "the discharge of any *pollutant* by any person" except in compliance with the Act - with "discharge of a pollutant" defined to mean "any *addition* of any *pollutant* to navigable waters from any *point source*." 33 U.S.C. § 1362(12)(A) (emphasis supplied). The terms "addition" and "pollutant" had no jurisdictional significance in any prior versions of the Clean Water Act extending as far back as 1948, and the phrase "discharge of a pollutant" had not appeared at all. It is clear, therefore, that when the water quality certification requirement first appeared in the 1970 Act, the phrase "any discharge" could not have contained the limitations petitioner advances.

2. Contrary to petitioner's claim (Pet. Br. 29-33), congressional recodification of Section 21(b) of the 1970 Act as Section 401 in the 1972 Act evinces no intent to reduce the scope of activities requiring State certification. Not only, as petitioner concedes (Pet. Br. 29), did Congress retain verbatim the same jurisdictional language of section 21(b)(1) - certification was still required of "[a]ny

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[24] The floor debates included numerous references, including by the floor managers of the legislation, similarly reflecting the legislators' shared understanding that the construction and operation of federally-licensed hydropower facilities would be subject to the State certification requirement. *See, e.g.*, 115 Cong. Rec. 28971 (1969) (statement of Sen. Cooper); 116 Cong. Rec. 8984 (1970) (statement of Sen. Muskie); *id.* at 9004 (statement of Sen. Cooper); *id.* at 9332 (statement of Rep. Fallon).

applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge into the navigable waters" (Pub. L. No. 92-500, § 401(a)(1), 86 Stat. 877) - but the contemporaneous legislative reports made clear both congressional intent not to change the jurisdictional scope of the certification requirement and the legislative assumption that federally licensed hydropower facilities would continue to be covered.[25] Congress understood that "[t]he purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements." S. Rep. No. 92-414, at 69. "Quite obviously, reenacting precisely the same language would be a strange way to make a change." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).

3. Undaunted by either the plain meaning of the statutory language or the clarity of the statute's purpose, structure, and legislative history, petitioner tenaciously argues (Pet. Br. 30-31) that Congress should not be taken at its word. Petitioner asks this Court to read beyond the face of the language that Congress enacted and to discern behind that language a legislative purpose to narrow the

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[25] *See* S. Rep. No. 92-414, 92d Cong., 1st Sess. 69 (1971) ("section [401(a)] is substantially section 21(b) of existing law * * * amended to ensure consistency with the bill's changed emphasis from water quality standards to effluent limitations based on the elimination of any discharge of pollutants"); H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 121 (1972) ("Section 401 is substantially section 21(b) of the existing law amended to assure that it conforms with the new requirements of the Federal Water Pollution Control Act"); S. Rep. No. 92-414, *supra*, at 69 ("It should be noted that the Committee continues [from section 21(b)] the authority of the State or interstate agency to act to deny a permit and thereby prevent a Federal license or permit from issuing * * * to a discharge source within such State * * * by such Federal agencies as the * * * Federal Power Commission"). The section was "amended to ensure consistency" with the new focus on technology-based effluent limitations by making clear that the certifying State was to certify not merely that the permitted activity would comply with applicable water quality standards (as required under the 1970 Act), but also with the standards and limitations of newly-adopted sections 301, 302, 306, and 307, 33 U.S.C. §§ 1311, 1312, 1316, 1317. *See* 33 U.S.C. § 1341(a).

scope of Section 401. Petitioner accordingly argues (*id.*) that Congress did not provide that "discharge" *means* "discharge of a pollutant" for only the very narrow purpose of making clear that "thermal discharge" would fall within the meaning of the term "discharge."

Petitioner's tenacity notwithstanding, its argument is belied by the language that Congress passed. Congress chose language that does not remotely hint at petitioner's proffered narrow purpose, which could have been easily and directly accomplished by quite different language. Congress instead took care to define the critical term "discharge" in a deliberately inclusive fashion so as not to restrict it to mean only a "discharge of a pollutant." All that the legislative history cited by petitioner demonstrates, therefore, is that Congress chose to reject language that might have been construed as limiting the meaning of "discharge" to either a "discharge of a pollutant" or "thermal discharge," in favor of a broad, inclusive, nonrestrictive definition.[26] This case provides no occasion for this Court to depart from the plain meaning of the language that Congress enacted in favor of a party's claimed discovery of a legislative body's true intent based upon snippets of legislative history.

### III. Longstanding and Settled Administrative Construction of Section 401 and the Reasonable Reliance on that Construction Further Support the View that Hydropower Facilities Result in "Discharges" Within the Plain Meaning of Section 401

Maine's decision that petitioner's facilities require Section 401 certification is also consistent with the longstanding policy and practice of the federal Executive Branch dating back to 1970, when Congress first

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[26] Congress elsewhere resolved its debates about the proper status of thermal discharges by including "heat" within the definition of pollutant (*see* Pub. L. No. 92-500, 86 Stat. 886 (33 U.S.C. § 1362(6)), and by providing for regulation of "thermal discharges" more reflective of their distinctive character (*see* 86 Stat. 876 (33 U.S.C. § 1326(a)).

established the water quality certification program in Section 21(b) of the Water Quality Improvement Act. The Federal Power Commission (FPC), FERC's predecessor, began requiring water quality certification for original or new licenses for hydropower projects soon thereafter. And, EPA, which has principal responsibility for administering the Clean Water Act, has consistently maintained that Section 401 is triggered by the operation of a federally licensed hydroelectric facility. The States, along with thousands of public and private users of this Nation's water resources, have reasonably relied on this understanding of the water quality certification requirement for over 35 years, and there is no basis for this Court's upsetting those well-settled expectations.

### A. The Federal Government Has Consistently Interpreted Section 401 as Requiring State Certification for the Licensing and Relicensing of Hydroelectric Facilities

1. Soon after Congress passed the 1970 Act in April 1970, the FPC began conditioning new licenses for existing facilities, as it did for initial licenses, on the applicant's compliance with the state water quality certification requirement under Section 21(b). With two early exceptions, the FPC made the submission of a "certification of reasonable compliance * * * with Section 21(b)" a condition of *every* new license that the FPC issued to an existing facility in a published order.[27] "[A]n

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[27] *See Empire Dist. Elec. Co.*, 44 F.P.C. 614, 616 ( 1970); *J.P. Stevens & Co.*, 44 F.P.C. 1041, 1042 (1970); *Cascade Power Co.*, 44 F.P.C. 1195, 1196 (1970) (similar condition); *W. Penn. Power Co.*, 44 F.P.C. 1279, 1280 (1970) (same); *Dan River Mills, Inc.*, 44 F.P.C. 1267, 1267-68 (1970) (same), vacated on other grounds, 51 F.P.C. 1861 (1974); *Cent. Me. Power Co.*, 44 F.P.C. 1451, 1451-52 (1970) (same); *Cent. Me. Power Co.*, 44 F.P.C. 1447, 1447-48 (1970) (same). Beginning in 1971, the FPC worded its license conditions differently in its published orders, while still making clear that compliance with the 1970 Act was required. *See Pac. Gas Elec. Co.*, 45 F.P.C. 30, 32 (1971) (license renewal conditioned on applicant "submit[ting] to the Commission certification of reasonable compliance with applicable water quality standards pursuant to Section 21(b) * * * or * * * otherwise demonstrat[ing] satisfactory

administrative 'practice has peculiar weight'" where, as here, "'it involves a contemporaneous construction of a statute' * * *." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (quoting *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933)). Moreover, prior administrative construction is even more weighty because when Congress recodified the certification requirement as Section 401(a) of the 1972 Water Act, Congress retained the same language to describe the scope of activities triggering that requirement. "[R]epetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well." *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (citing *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978)).

2. No doubt for this reason, the FPC[28] and its successor

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compliance with the terms and purposes of said Water Quality Act"), *amending* 44 F.P.C. 1373 (1970); *Pac. Gas & Elec. Co.*, 45 F.P.C. 28, 30 (1971) (same), *amending*, 44 F.P.C. 1365 (1970); *Bibb Mfr. Co.*, 45 F.P.C. 525, 525 (1971) (same); *CWC Fisheries, Inc.*, 45 F.P.C. 980, 981 (1971) (same); *Leonard Lundgren*, 47 F.P.C. 1027, 1029 (1972) (same); *see also Wash. Water Power Co.*, 48 F.P.C. 339, 342 (1972) (noting that water quality certification has been obtained). *But see Wash. Water Power Co.& Lee W. Cagle*, 44 F.P.C. 626 (1970); *New Eng. Fish Co.*, 44 F.P.C. 723 (1970).

[28] For example, during the three years following the 1972 Act, every published FPC order issuing a new license to an existing hydropower facility notes that the applicant provided the Commission with proof of state water quality certification, or of waiver of the requirement. *See Scott Paper Co.*, 49 F.P.C. 256, 257 (1973); *Wis. Pub Serv. Corp.*, 50 F.P.C. 1013, 1015 (1973); *Village of Gresham, Wis.*, 51 F.P.C. 265, 265 (1974); *S.C. Elec. & Gas Co.*, 52 F.P.C. 537, 539 (1974); *Nekoosa Edwards Paper Co.*,52 F.P.C. 1020, 1021, (1974); *Wis. Mich. Power*, 52 F.P.C. 1201, 1201 (1974); *Pac. Gas & Elec. Co.*, 52 F.P.C. 1898, 1900 (1974); *Consol. Water Power Co.*, 53 F.P.C. 146, 147 (1975); *City of Seattle, Wash.*, 53 F.P.C. 207, 208 (1975); *Idaho Power Co.*, 53 F.P.C. 1004, 1008 (1975); *Wis. Pub. Serv. Corp.* 53 F.P.C. 1093, 1093 (1975); *Eagle-A/Linweave Div., Brown Co.*, 53 F.P.C. 1070, 1071 (1975); *Commonwealth Edison Co.*, 53 F.P.C. 1190, 1191 (1975); *Niagra of Wis. Paper Corp.*, 53 F.P.C. 1437, 1437 (1975); *Reeves Bros.*, 53 F.P.C. 1449, 1450 (1975); *Puget Sound Power & Light Co.*, 53 F.P.C. 1657, 1659 (1975); *Sho-me Power Corp.*, 53 F.P.C. 1999, 2000, 2009 (1975); *Wis. Pub. Serv. Corp.*, 54 F.P.C. 521, 522 (1975); *Wis. Pub. Serv. Corp.*, 54 F.P.C. 535, 537 (1975); *Ala. Power Co.*, 54 F.P.C. 2452, 2456 (1975); *Pac. Gas & Elec. Co.*, 54 F.P.C. 1750, 1752 (1975); *Utah Power & Light Co.*, 54 F.P.C. 2105, 2107 (1975); *Utah Power & Light Co.*, 54 F.P.C. 2433, 2435

agency, FERC, have uniformly maintained that interpretation after passage of the 1972 Act. In numerous adjudicatory decisions, FERC has treated water released from hydropower dams as a "discharge" for purposes of Section 401 without regard to whether the dam in question is discharging "pollutants" as that term is defined for purposes of other provisions of the Clean Water Act.[29] Indeed, in a recent decision, FERC squarely rejected the argument espoused by petitioner here - that a "discharge" for purposes of Section 401 requires the "addition" of a "pollutant," or at least the "addition" of something from the outside river. FERC distinguished this Court's decision in *Miccosukee* and reconfirmed its position that water released from a hydroelectric facility constitutes a "discharge" for purposes of Section 401. *See City of Augusta, Ga.*, 109 F.E.R.C. ¶ 61,210 (2004).[30]

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(1975); *Ind. & Mich. Elec. Co.*, 54 F.P.C. 2739, 2743-44 (1975).

[29] *See, e.g., U.S. Gen. New Eng. Inc.*, 99 F.E.R.C. ¶ 62,025, 64,058 (2002); *Cent. Vt. Pub. Serv. Corp.*, 85 F.E.R.C ¶ 61,410, 62,557 (1998); *S.C. Elec. & Gas Co.* 73 F.E.R.C. ¶ 62,124, 64,307 (1995); *City of Fort Smith*, 42 F.E.R.C. ¶ 61,362, 62,047 (1988).

[30] Petitioner has mistakenly suggested that the D.C. Circuit's opinion in *North Carolina v. FERC*, 112 F.3d 1175, 1187 (D.C. Cir. 1997) and FERC's litigation position in that case are to the contrary. Pet. 11, 15, 21; Pet. Br. 15. In that case, FERC argued and the D.C. Circuit held that a Section 401 certification was not triggered in the context of an *amendment* of an existing FERC license exclusively concerned with the proposed construction and operation of a pipeline that would withdraw water from a navigable water body for use as drinking water. It was only in that distinct context of an *amendment* to an existing license that FERC stated that Section 401 jurisdiction turned on whether the change in operation, rather than the entire facility, amounted to a discharge, and the D.C. Circuit agreed with FERC that the pipeline did not. *See* 112 F.3d at 1187. But where, as here, petitioner is seeking a *new* license upon expiration of an existing license and not an amendment, FERC made clear on remand in that same case that Section 401 jurisdiction considers the entire facility operation, including existing discharges to be continued in the future, and not just changes in the facility's operation. *See Va. Elec. & Power Co.*, 77 F.E.R.C. ¶ 61,138, 61,519 (1997). ("In a proceeding for a new license (relicense) of the project after the original license has expired, * * * the activity requiring certification is the continued operation of the project" and "[t]he place of discharge is the place at which the

3. EPA agrees. As the federal agency with primary responsibility for the Clean Water Act, EPA has spoken to the question presented before this Court on numerous occasions and in no uncertain terms. The Agency has consistently maintained in its many publications, including guidance documents and handbooks, that "licenses required for hydroelectric projects issued under the Federal Power Act" are among the federal permits and licenses "authorizing activities which may result in a discharge to the waters" and therefore are "subject to 401 certification."[31]

Notwithstanding petitioner's selective use of ellipsis (Pet. Br. 22), nothing in the recent EPA memorandum regarding the legal status of water transfers under the Clean Water Act is inconsistent with EPA's longstanding position regarding the scope of Section 401. *See* Pet. Br. 22 (quoting Memorandum from Ann R. Klee, EPA General Counsel, & Benjamin H. Grumbles, EPA Asst. Administrator for Water, to Regional Administrators, *Agency Interpretation in Applicability of Section 402 of the Clean Water Act to Water Transfers* (Aug. 5, 2005)). EPA clearly stated in that memorandum that the Agency was not addressing the status of dams under the Water Act. The memorandum expressly provides that "[t]his Agency

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project waters leave the project impoundment or bypass facilities and reenter the river"). Amicus Salt River Project Agric. Improv. & Power Dist., supporting petitioner, is therefore flatly wrong in contending (Amicus Br. 8) that the D.C. Circuit has "held that a 'discharge' under Section 401 of the CWA requires an 'addition' of a substance or substances into navigable waters."

[31] EPA Office of Wetlands Protection, *Wetlands and 401 Certification*, 20 (Apr. 1989); *see, e.g.*, EPA Office of Water, *Water Quality Standards Handbook* § 1.4 (2d 1994) ("Section 401 is intended to ensure that Federal permits and licenses comply with applicable water quality requirements, including State water quality standards, and applies to all Federal agencies that grant a license or permit," including "licenses required for hydroelectric projects issued under the Federal Power Act"); EPA Office of Wetlands Protection, *National Guidance: Water Quality Standards for Wetlands* § 6.1 (1990) ("Section 401 gives the States the authority to grant, deny, or condition certification of Federal permits or licenses (*e.g.* * * * Federal Energy Regulatory Commission licenses * * *) that may result in a discharge to 'waters of the U.S.'").

interpretation addresses only water transfers" and "the movement of water through a dam is not a water transfer because the dam merely conveys water from one location to another within the same water body." *Id.* at 18 & n.18.[32]

4. Representing the United States before this Court, the Solicitor General has maintained the same position. The government's brief in *PUD No.1* more than a decade ago asserted that the proposed hydroelectric facility in that case, which was, like petitioner's here, a run-of-the-river facility, would cause multiple distinct discharges, including a discharge "at the point where the water not needed to run the turbines is released at the dam itself." U.S. Amicus Br. Supporting Affirmance, *PUD No. 1*, at 14-15. "[W]hen the operator of the dam releases water through a crest-gate, sluice-gate, release valve, or other similar device, it has caused a discharge within the meaning of Section 401." *Id.* That the operation of the proposed facility might not "add" any "pollutants" to the river was of no moment, the United States explained, because "Congress employed the term 'discharge' when used without qualification (as in Section 401(a)) more broadly than the term 'discharge of any pollutant,' which is used in a number of other provisions of the CWA." *Id.* at 15 n.4 (citations omitted). While neither briefs filed by the United States nor EPA publications warrant "*Chevron*-style deference," *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), such "[c]ogent administrative interpretations * * * not [the] products of formal rulemaking * * * nevertheless warrant respect." *Alaska Dep't of Envtl Conservation v. EPA*, 540 U.S. 461, 488 (2004) (quoting *Wash. State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003)) (ellipsis in

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[32] The language that petitioner seizes is contained in a footnote parenthetical acknowledging nothing more than EPA's longstanding position that point source conveyances of water by dams do not require a Section 402 permit unless those conveyances also include pollutants. This case, however, does not involve the status of dams under Section 402, where there must be a "discharge of a pollutant," but under Section 401, where Congress required only "any discharge" to trigger its application.

original).

### B. The Reliance Interests Created by Section 401's Plain Meaning Underscore the Illegitimacy of Petitioner's Request for Relief Securable only from Congress and not from the Courts

The States have long relied on the plain and well-settled meaning of Section 401 in pursuing the complex task of setting and achieving water quality standards for individual water bodies. In determining the appropriate water quality goals, and in allocating the burdens for achieving those goals among myriad dischargers, States seek to have hydropower projects shoulder their fair share.

Over the years, the hydropower industry, among others, has mounted several campaigns to persuade Congress to exempt them from compliance with Section 401.[33] Indeed, Congress is currently debating proposed amendments to Section 401 as it applies to federal permitting and licensing of oil refineries and pipelines. *See* 151 Cong. Rec. H8748 (daily ed. Oct. 7, 2005). Congress has yet to pass these proposals and we believe correctly so. But, whatever their individual merits, what is clear is that such legislative proposals represent the only legitimate way to achieve a change in the plain, settled meaning of a federal statute. *Cf. Morrison-Knudsen Constr. Co. v. Office of Workers Comp.*, 461 U.S. 624, 636 (1983) ("If these reasonable expectations are to be altered, that is a task for Congress * * * ").

More than 35 years ago, Maine's own Senator, Edmund Muskie, described the promise of the statutory language at issue in this case upon its initial congressional enactment in 1970: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of [a] water quality standard." 116 Cong. Rec.

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[33] *See* Claudia Copeland, Cong. Res. Serv., *Clean Water Act Section 401: Background and Issues* (updated Oct. 1998) (describing attempts to exempt hydroelectric facilities from Section 401 in the wake of this Court's decision in *PUD No. 1*), *available at* http://www.ncseonline.org/nle/crsreports/water/h2o-3.cfm.

8984 (1970). The State of Maine and now the United States, including FERC, seek to honor that promise, now long overdue in its application to the Presumpscot River. The Court should allow them to do so.

## CONCLUSION

The judgment of the Maine Supreme Judicial Court should be affirmed.

Respectfully submitted.

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JANUARY 2006